

does not arise at all. The debtor therefore failed on this ground.

In respect of the additional ground relied on by the debtor's Counsel in his written submission, it is to be noted that the interest charged was in accordance to the judgment obtained (see GLH 1). There has been no appeal in respect of the said judgment. The bankruptcy notice was issued in accordance with the judgment obtained against the debtor. In any event, it is too late for the debtor to raise this issue now as he had not given notice to the creditor under s. 3(2)(ii) of the Act. The subsection reads -

Provided that a bankruptcy notice -

(i) ...

(ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

Section 3(2)(ii) of the Act was considered by Chang Min Tat J. (as he then was) in *Re Arunachalam; Ex-parte Indian Overseas Bank Ltd.* [1968] 1 MLJ at p. 90 -

On the authorities, it seems to me reasonably clear that where an excess is claimed in the bankruptcy notice and no such notice of dispute of the validity of the notice by reason of such excess is given, then the bankruptcy notice is not invalid merely by reason of the excess.

For the reasons set out by me this additional ground of the debtor is totally baseless and accordingly the debtor failed on this ground also.

In the circumstances, I dismissed the notice of motion of the debtor with costs. The debtor appealed against my said order.

SABDIN GHANI

v.

MUSA HAJI AMAN

HIGH COURT, KOTA KINABALU
DATO' SYED AHMAD IDID J.
[ORIGINATING SUMMONS NO. K.70 OF 1991]
16 DECEMBER 1992

ADMINISTRATIVE LAW: Withdrawal of appointment as Secretary-General - Whether there was breach of rules of natural justice - Whether there is provision in Constitution of society to withdraw appointment.

In November 1990, the President of the Dewan Perniagaan Bumiputra Sabah (Dewan) re-appointed the plaintiff as its Secretary-General for the period 6 November 1990, to 30 October 1993 pursuant to Article 10 of the Dewan's Constitution. On 12 August 1991, the plaintiff was asked to voluntarily relinquish (or resign) his post as Secretary-General. On 22 August 1991, the President of the Dewan informed the plaintiff by letter that the Supreme Council of the Dewan had withdrawn the plaintiff's appointment pursuant to Article 11(5)(i) of the Dewan's Constitution with immediate effect.

The plaintiff contends that the withdrawal of his appointment as Secretary-General is invalid on two grounds:

- (i) that it breaches the rules of natural justice; and
- (ii) by Article 11(5)(i) of the Dewan's Constitution the Supreme Council can dismiss but not withdraw his appointment as Secretary-General of the Dewan.

Held:

[1] By the plaintiff's own account and by the minutes, it can be seen that the plaintiff gave a forceful account of himself at the meeting. Many will say that there is nothing more just than to be judged by one's peers. There is no denying that the Council were the plaintiff's peers. There is no evidence that the Council were biased or that the proceedings were not in the bona fide exercise of the powers of the Council. The plaintiff has not advanced any reason to prove that the members of the Council were biased or fraudulent or malicious.

[2] He who gives, retrieves. The President is here backed by the overwhelming decision of the Council. Where the Constitution confers powers to appoint, the appointing authority should also have the power to remove, to suspend, to re-appoint or reinstate.

[*Plaintiff's Originating Summons dismissed*].

Cases referred to:

Walter Annamuthodo v. Olifield Workers' Trade Union [1961] AC 945 (*cit*)
Frost v. Boland 5B & C 611 (*cit*)
Newlands v. National Employers Accident Association 54 LJQB 430 (*cit*)
Fadzil Bin Mohammad Nor v. Universiti Teknologi Malaysia [1981] 2 MLJ 196 (*dist*)
Chong Kok Lim & Ors. v. Yong Su Hiam [1979] 2 MLJ 11 (*dist*)
Tan Choon Chye v. Singapore Society of Accountants [1979] 2 MLJ 61 (*dist*)
B. Mahesan v. K.K. Lim [1987] 2 MLJ 160 (*dist*)
Army Civil Service Union v. Chacko & Ors. [1965] 2 MLJ 42 (*dist*)
Malloch v. Aberdeen Corporation [1971] 2 All ER 1278 (*dist*)
Lim Ko v. Board of Architects [1966] 2 MLJ 80 (*dist*)
Samsuri Bin Haji Dollah v. Sandakan Municipal Council [1988] 1 CLJ 581 (*dist*)
Anandarajan & Ors. v. Mahadevan [1971] 2 MLJ 8 (*cit*)
Ridge v. Baldwin [1964] AC 40 (*cit*)

Legislation referred to:

Societies Act 1966, ss. 2, 27(3), 34 & 51
 Interpretation Acts 1948 and 1967, ss. 47 & 94
 Members of the Administration and the Legislative Assembly (Remuneration) Enactment 1980, ss. 6(1)(e), 13(1), 15(1) & (2)
 University and University Colleges Act 1971

Other sources referred to:

Administrative Law of Malaysia and Singapore 2nd Edn., p. 255
 English White Book 1988
 Mallal's Supreme Court Practice
 The Law of Domestic Inquiries and Dismissals [1988] p. 37
 Woodroffe's Injunctions [Edn. 1988] p. 192
For the plaintiff - Sugumar Balakrishnan; M/s. Sugumar & Co.
For the defendant - Anthony Roderic Fernandez; M/s. Shelley Yap Leong Tseu Chong Chia & Co.

JUDGMENT

Syed Ahmad Idid J:

Can a person continue as Secretary-General of a society when the Supreme Council (or Majlis Tertinggi) of that society has

a withdrawn such an appointment. But firstly, is the society or its Council empowered to withdraw the appointment? The answers to these questions will determine the decision on the issue.

b The plaintiff and the defendant agree that in November 1990 the President of the Dewan Perniagaan Bumiputera Sabah (or Dewan) re-appointed the plaintiff as its Secretary-General for the period 6 November 1990 to 30 October 1993 pursuant to Article 10 of the Dewan's Constitution. Plaintiff was paid a monthly allowance of RM1,500 in this connection. Then on 12 August 1991 the plaintiff was asked to "voluntarily relinquish (or "resign") his post as Secretary-General". On 22 August 1991 the President of the Dewan informed the plaintiff by letter that the Supreme Council of the Dewan had withdrawn the plaintiff's appointment pursuant to Article 11(5)(i) of the Dewan's Constitution with immediate effect. The Supreme Council of the Dewan had unanimously approved the President's proposal. However, in recognition of the plaintiff's services to the Dewan, the President had also proposed, and the Council had agreed, that the plaintiff be made a member of the Supreme Council as well as of the Executive Committee and that the plaintiff will continue to hold his positions in the subsidiary companies of Syarikat DPBS Holdings Sdn. Bhd.

f What exactly transpired between the plaintiff and the Yang Di-Pertua or President of the Dewan? According to the President of the Dewan;

- g* (i) he informed all the members of the Supreme Council, including the plaintiff, at their meeting on 21 August 1991 of his discussion on 12 August 1991 with the plaintiff and of plaintiff's reply (of 16 August 1991);
- (ii) he moved a motion for the Supreme Council to decide on the position of the plaintiff and his motion was seconded by a Supreme Council member, Encik Tadus Udin;
- (iii) at all material times the plaintiff knew, or ought to have known, that he would move such a motion at the meeting;
- (iv) he then gave the plaintiff the opportunity to explain his position;

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- (v) the plaintiff thereupon alleged that the President was seeking to remove him due to their different "political ideology";
- (vi) plaintiff explained that he could still continue to carry out his tasks as Secretary-General notwithstanding his other commitments;
- (vii) plaintiff also suggested that the Supreme Council of the Dewan be dissolved and fresh elections be held;
- (viii) plaintiff threatened that if the Dewan proceeded to dismiss him as Secretary-General he would bring the matter to the Court (which is why we are here today);
- (ix) after hearing the plaintiff, the President reiterated his earlier position and left the matter to the Supreme Council for its decision;
- (x) the other Supreme Council members then unanimously requested for both the plaintiff and the president to leave the room temporarily to enable them to deliberate on the matter without prejudice and to arrive at their own decision;
- (xi) after the other Supreme Council members had deliberated both the plaintiff and the President were invited into the room where the Deputy president, Encik Martin Peter Ali, informed all present that the Supreme Council members had unanimously resolved to withdraw the appointment of the plaintiff as the Secretary-General whilst at the same time agreeing to appoint him as a member of the Supreme Council and the Executive Committee and retaining him in all his positions in all the companies owned by the Dewan.

The plaintiff was advised by his solicitors that the withdrawal of his appointment as Secretary-General pursuant to Article 11(5)(i) of the Dewan's Constitution is void and of no effect since, in the solicitor's opinion, Article 11(5)(i) does not empower the Supreme Council of the Dewan to withdraw his appointment as the Secretary-General of the Dewan. The plaintiff contends that such withdrawal is invalid on two grounds:

- (1) that it breaches the rules of natural justice; and

- a (2) by Article 11(5)(i) of the Dewan's Constitution the Supreme Council can "memecat" (dismiss) but not withdraw his appointment as Secretary-General of the Dewan.

I accept Lord Denning's observations in *Walter Annamunthodo v. Oilfield Workers' Trade Union* [1961] AC 945 that

if a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the Courts. It is a prejudice to any man to be denied justice.

- c Accordingly the plaintiff comes to Court and seeks:

- d (1) a declaration that the withdrawal of his appointment as Secretary-General is *ultra vires* the Constitution of the Dewan Perniagaan Bumiputera Sabah and null and void and of no effect;
- e (2) another declaration that he is and continues to remain as Secretary-General and entitled to exercise all the privileges, powers, functions and holding titles thereto; and
- e (3) an injunction to restrain the President and the Supreme Council members of the Dewan or their agents and servants from obstructing him in exercising all such privileges, powers, functions as Secretary-General until 30 October 1993.

- f Article 10 of the Dewan's Constitution states that the Supreme Council (or Majlis Tertinggi) is made up of the President, his Deputy, 7 members Elected at the General Meeting, 5 members Appointed by the President who also Appoints the Secretary-General and the Honorary Treasurer both of whom also form part of the Supreme Council. The regular employment of a person in a particular function is equivalent to his being "appointed" to it ... *Frosi v. Bolland* 5 B & C 611. "A Secretary", said Lord Esher, "is a mere servant. His position is that he is to do what he is told ..." *Newlands v. National Employers Accident Association* 54 LJQB 430. But by s. 2 of the Societies Act 1966, a secretary is an "office-bearer" and his importance is equal to the functions he is expected to perform for the Dewan. See s. 27(3), 34 and 51 of the same Act.

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Article 11(5)(i) places upon the Majlis Tertinggi the powers, responsibility and duty of "menerima perletakan jawatan mana-mana Ahli Majlis tertinggi atau memecat mana-mana Ahli Majlis Tertinggi" (receiving the resignations from and dismissing any of the Supreme Council members). If one is vested with the powers to dismiss, cannot this also entail the power to withdraw an appointment? Here the plaintiff contends that this Article does not permit the Council to "withdraw" his appointment. Mr. Roderick Fernandez, in reply, suggests that as the Council has the powers to dismiss, they must also have the power to withdraw or terminate.

Mr. Sugumar asserts that the withdrawal of appointment as Secretary-General of the Dewan is a serious matter which has adversely affected the plaintiff's public standing. As this is an application for declarations, we have to confine the issues to whether such withdrawal is *ultra vires* or is it valid? We must distinguish the decision of *Fadzil bin Mohammad Nor v. Universiti Teknologi Malaysia* [1981] 2 MLJ 196 as the appellant there was in public service and the University and University Colleges Act 1971 was applicable. The plaintiff here is not in public service. Likewise the case of *Chong Kok Lim & Ors. v. Yong Su Hian* [1979] 2 MLJ 11 is distinguished as there the expulsion was from Membership of the Association whereas in our case to-day the "withdrawal of appointment" is in respect of the post of Secretary-General to which plaintiff was appointed by the President. In the latter case, the Federal Court observed that it was not the function of the Court to determine whether a member ceases to be a member but rather it was up to the Executive Committee to resolve that.

In the several authorities cited by learned Counsel for the plaintiff, the facts differ from those of to-day, e.g. the affected persons had their Membership terminated. See, e.g., *Chong Kok Lim & Ors. v. Yong Su Hian* (*supra*); *Tan Choon Chye v. Singapore Society of Accountants* [1979] 2 MLJ 61 where the Court upheld the Society's finding that the appellant had committed grave impropriety; *B. Mahesan v. K.K. Lim* [1987] 2 MLJ 160 (alteration of terms of Membership); *Army Civil Service Union v. Chacko & Ors.* [1965] 2 MLJ 42 (which dealt with secret ballot); *Malloch v. Aberdeen Corporation* [1971] 2 All ER 1278

a (dismissal of an employee - a teacher - not in accordance with Education (Scotland) Act nor with the 1882 Act); *Lim Ko v. Board of Architects* [1966] 2 MLJ 80 where the Federal Court found that the proceedings before the Board were conducted with punctilious regard for justice and fair play and there was no violation of the rules of natural justice and *Samsuri bin Haji Dullah v. Sandakan Municipal Council* [1988] 1 CLJ 581 (case of house demolition). I have considered these judgments for their persuasive influence but I note that plaintiff in to-day's case has not claimed that it was his membership that was terminated. If that were so, then Article 9(2) procedure should have been followed and its breach would certainly make the termination *ultra vires*.

d Gill FJ. in the Federal Court in *Anandarajan & Ors. v. Mahadevan* [1971] 2 MLJ 8, referred to *Ridge v. Baldwin* [1964] AC 40 where Lord Hodson said: "No one, I think, disputes that three features of natural justice stand out:

- (1) the right to be heard by an unbiased tribunal;
- e* (2) the right to have notice of charges of misconduct;
- (3) the right to be heard in answer to those charges."

According to The Law of Domestic Inquiries and Dismissals [1988], the essential elements of natural justices are:

- f* (i) No man shall be judged in his own cause (*nemo debet esse judex in propria causa*); and
- (ii) No man to be condemned unheard (*audi alteram partem*).

g From the facts, if at all the President was the accuser or the prosecutor, he was not the one who made the decision... "he and the plaintiff were both asked to leave the meeting room whilst the Supreme Council deliberated on the matter without prejudice and they arrived at their own decision." By the plaintiff's own account and by the minutes, it can be seen that the plaintiff gave a forceful account of himself at the meeting. Many will say that there is nothing more just than to be judged by one's peers. There is no denying that the Council were the plaintiff's peers. I am unable to see any evidence that the Council were biased or that the proceedings were not in the

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bona fide exercise of the powers of the Council. The plaintiff has not advanced any reason to prove that the members of the Council were biased or fraudulent or malicious [Woodroffe's Injunctions (revised and enlarged Edn. 1988) p. 192]. I am unable to accept the plaintiff's contention that the Dewan was not competent to decide on his case in the absence of evidence of their inability or incapacity in this respect.

From what I have outlined, it is discernable that the President and the Supreme Council provided an opportunity to the plaintiff to say his piece, instead, the plaintiff challenged the Council to dissolve and hold fresh elections. He did not address himself on the issues raised by the President nor did he ask that the matter be postponed so as to give him another opportunity to be heard or for a continued hearing. Mr. Roderick Fernandez cited Administrative Law of Malaysia and Singapore (2nd Edn.) in support, and I agree that one has to look at the surrounding factors to see whether a person has been denied an opportunity to rebut the charges or complaints against him. I have considered M.P. Jain's Administrative Law of Malaysia and Singapore (*supra*) at p. 255 where it says that "a notice to be meaningful should state the grounds on which action is proposed to be taken in clear, specific and unambiguous terms." In my opinion, the notice given to the plaintiff was sufficient looking at the circumstances of the persons and the dates.

I am of the view that the Secretary-General "bertanggungjawab secara langsung kepada Yang Di-Pertua" (or is directly accountable to the President) - Article 10(6)(c). While he is not subservient nor a servant, he is nevertheless subordinate to the President. From the practice and the functions, it seems he holds office at the pleasure of the President. The President, by Article 10(6)(a)(ii), is responsible for the duties of the Secretary-General (among others). The President had appointed him and now the President, mid-way through the plaintiff's term as Secretary-General, says "Sorry, we cannot work together" (and both had, on 12 August 1991, a "heart-to-heart discussion" or a meeting of differences). The President for some reason or other (which are not materially contested here), says "Why don't you relinquish?" In other words, he means "Look, I cannot have you as my Secretary-General any longer." He who gives,

a retrieves. The President is here backed by the overwhelming decision of the Council. I am of the opinion that where the Constitution confers power to appoint, the appointing authority should also have the power to remove, to suspend, to re-appoint or reinstate. Compare ss. 47 and 94 of Interpretation Acts 1948 and 1967.

b One can imagine what will happen to all societies if the Courts say "No, Mr. President, you cannot withdraw the appointment. Like it or not, you and the Secretary-General both must stick together". With the misunderstanding or enmity or on any other basis, the relationship sours and the society suffers. I cannot accept that. In my opinion, the President offers and he now retracts. He is entitled to do so because the overall responsibility for the success and achievement of the Society (or Dewan in this case) rests with the President...

c The plaintiff here, it must be stressed, was appointed by the President or "dilantik oleh Yang Di-Pertua". In several other organizations, the holder of such a post ... or Honorary Secretary is elected and he is assisted by an Executive Secretary who is a paid employee.

d In the instant case, however, the plaintiff was not elected and neither was he an employee, and this makes his position substantially different from those cases cited earlier.

e While the plaintiff was the Secretary-General of the Dewan, he was paid RM1,500 as monthly allowance. He then became the Political Secretary to the Ministry of Local Government and Housing as from 19 December 1990 where he receives a monthly salary of RM2,000 [Members of the Administration and the Legislative Assembly (Remuneration) Enactment 1980 - Section 6(1)(e)]. There is no evidence of any restriction under the Constitution of Sabah against a Political Secretary holding an office of profit or one where an allowance is payable. But the Chief Minister may at any time and without assigning any reason terminate such appointment [Section 13(1)]. The duties and functions of a Political Secretary are exclusively political in nature [Section 15(1)]. The Dewan did not terminate the plaintiff's membership. On the contrary, they were magnanimous when they offered the plaintiff membership in the Supreme Council and the Executive Committee and even invited him to retain his posts in the subsidiary companies. But the plaintiff did not bother to accept these.

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Neither did he respond in writing. In view of the poor relationship which exists between the two parties, would it not be preferable that the plaintiff concentrates on his duties to the Ministry [which he must perform in accordance with the directions of the Minister-Section 15(2)] and let another member carry out the duties of Dewan's Secretary-General? I make this observation in the interests of both the members of the Dewan and the Government of the State of Sabah. In *The Law of Domestic Inquiries and Dismissal* (at p. 37) "... in the final analysis what matters most is not who is right but what is right".

I am reminded by the English White Book 1988 that O. 28 r. 4, confers wide powers on the Court and approximates the rights of the plaintiff in an action begun by originating summons to those under O. 13, 14 and 19. See also Mallal's Supreme Court Practice on this matter. On the evidence given on affidavits, the statements made from the bar and upon consideration of the facts and legal principles, I am not inclined to granting the two declarations and the injunction which plaintiff seeks and accordingly I dismiss plaintiff's originating summons dated 28 August 1991. I make no order as to costs.

**a SENG CHOON HARDWARE (M)
SDN. BHD.**

v.

**b THE DIRECTOR GENERAL OF
KASTAM & EKSAIS DI RAJA M'SIA
AND THE GOVERNMENT OF
MALAYSIA**

HIGH COURT, KUALA LUMPUR
DATO' WAN ADNAN BIN ISMAIL J.
[CIVIL SUIT NO. D5-C3206-83]
11 JANUARY 1993

**c PRACTICE & PROCEDURE: Application to
amend defence-Application made when plain-
tiffs had tendered nearly all their evidence -
Amendment to plead new defence of limitation
- Whether amendment will prejudice plaintiffs
- Whether plaintiffs can be compensated in
costs.**

d The plaintiffs claim is in respect of the alleged wrongful seizure of the plaintiffs' valves by the defendants and for the return of money which the plaintiffs say they paid under duress as customs duties on valves which they allege were not dutiable.

e During the course of the trial the defendants applied to amend their defence to plead limitation which amounted to a new defence.

Held:

f [1] This defence was clearly available to the defendants from the very outset. The application was made at the time when the plaintiffs had already tendered nearly all their evidence.

g [2] The proposed defence being a plea of limitation will, if successful, afford the defendants a complete defence to the plaintiffs' second claim which is quite substantial. The prejudice that the proposed amendment will cause the plaintiffs cannot be compensated by costs.

[Application to plead limitation refused].

h Cases referred to:

Mahan Singh v. Government of Malaysia [1973] 2 MLJ 149 (**refd**)

Tildesley v. Harper 10 Ch. D 386, 397 (**refd**)

Clarapede & Co. v. Commercial Union Association 32 WR 263 (**refd**)

Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. [1983] 1 CLJ 191/[1983] 1 MLJ 214 (**foli**)

i *Hipgrave v. Case* [1885] 28 Ch. D. 356 (**foli**)